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No. 90-1248

IN THE

Supreme Court of the United States

October Term, 1990

CHANCE CORDREY, a minor; and KAREN AND ROBERT CORDREY, on behalf of their minor son,
Petitioners,

vs.

R. J. EUCKERT, Superintendent; GREGG SIMON, MARIANN GLECKLER, CAROL KLECK, RICHARD NAPIERALA, and LOREN PENNINGTON, in their capacities as members of the Evergreen Board of Education; EVERGREEN LOCAL SCHOOL DISTRICT; EVERGREEN BOARD OF EDUCATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Sixth Circuit's evaluation of a handicapped child's need for extended school year services through the use of a strict "regression/recoupment" standard conflicts with this Court's decision in *Hendrick Hudson Board of Education v. Rowley,* 458 U.S. 176 (1982) and Congressional intent under the Education of the Handicapped Act that each handicapped child receive an individualized "free appropriate public education."

2. Whether the Sixth Circuit's application of traditional procedural notions by allocating the burden of proof to the parents and by creating a harmless error exception to a school district's obligation to comply with procedural safeguards of the Education of the Handicapped Act is contrary to this Court's rulings and Congress' remedial intent.

TABLE OF CONTENTS

RESTATEMENT OF THE QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

RESTATEMENT OF THE CASE 2

REASONS WHY THE PETITION SEEKING DISCRETIONARY REVIEW SHOULD BE DENIED 7

I. THE SIXTH CIRCUIT'S USE OF A REGRESSION/RECOUPMENT STANDARD FOR DETERMINING A HANDICAPPED STUDENT'S ENTITLEMENT TO EXTENDED SCHOOL YEAR SERVICES (A) IS SUPPORTED BY THE STATUTE, (B) COMPORTS WITH THE REASONING OF THIS COURT, AND (C) IS IN ACCORD WITH DECISIONS AMONG THE CIRCUITS 7

A. The Education Of The Handicapped Act. . 7

B. Extended School Year Services 8

II. THE SIXTH CIRCUIT'S APPLICATION OF TRADITIONAL DEFENSES AND ITS ALLOCATION OF THE BURDEN OF PROOF AMONG PARTIES IN EDUCATION OF THE HANDICAPPED ACT CASES COMPORT WITH THE DECISIONS OF OTHER CIRCUITS AND PROVIDE NO BASIS FOR SUPERVISION BY THIS COURT 13

A. The Sixth Circuit Properly Allocated The Burden Of Proof To The Parents As The Party Proposing To Change The IEP ... 13

B. The Sixth Circuit's Conclusions Regarding Petitioners' Allegations Of Procedural Error Can Be Harmonized With The Decisions Of Other Circuits And Provide No Basis For Review By This Court 17

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986) 10,11,14

Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979) *aff'd sub nom. Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980) 9

Burger v. Murray, 612 F. Supp. 545 (N.D.Ga. 1984) . 14

Burke County Board of Education v. Denton, 895 F.2d 973 (4th Cir. 1990)..... 24

Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990) ..... *passim*

Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983) 8,9

Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990)..... 13,22

Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983)..... 8

Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985)..... 23,24

Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176 (1982) 8,10,17,19,25

Honig v. Doe, 484 U.S. 305 (1988)..... 14

Johnson v. Independent School District No. 4 of Bixby, 921 F.2d 1022 (10th Cir. 1990) 11,14

Lee v. Thompson, 1982-83 Educ. Handicapped L. Rep. (CRR Publishing), 554: 429 (D. Haw. 1983) .. 11

Rettig v. Kent City School District, 720 F.2d 463 (6th Cir. 1983) 9,10

Rettig v. Kent City School District, 539 F. Supp. 768 (N.D. Ohio 1981), *aff'd in part, vacated on other grounds*, 720 F.2d 463 9

S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1984) 14

Speilberg v. Henrico County Public Schools, 853 F.2d 256 (4th Cir. 1988) 23,24

Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983), *aff'd in part and rev'd in part sub nom., Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984) 14

Thomas v. Cincinnati Board of Education, 918 F.2d 618 (6th Cir. 1990) 22

Statutes

20 U.S.C. §1232g(a)(1)(A) 16

20 U.S.C. §1401(a)(16) 8

20 U.S.C. §1401(a)(17) 8

20 U.S.C. §1401(a)(18) 7

20 U.S.C. §1401(a)(19) 2

20 U.S.C. §1412(1) 7

20 U.S.C. §1415(b)(1)(A) 16

20 U.S.C. §1415(e)(3) 5,19

REGULATIONS

34 C.F.R. §300.343(a), (d) 21

34 C.F.R. §300.345(a) 15

34 C.F.R. §300.503(b) 15

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Respondents do not contest the Statement of Opinions of the United States District Court for the Northern District of Ohio and of the United States Court of Appeals for the Sixth Circuit set forth in the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Respondents do not contest the Statement of Jurisdictional Grounds set forth in the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

The Respondents agree that the statutory provisions involved are 20 U.S.C. §§1400 *et seq.*

RESTATEMENT OF THE CASE

Chance Cordrey is a multiply-handicapped student who is profoundly retarded and engages in some autistic-like behaviors (Tr. 27, 683). Chance resides with his parents in the Evergreen Local School District (Evergreen) in Fulton County, Ohio. Since 1981, he has been placed in multi-handicapped classes in the Toledo Public Schools and in Fulton County pursuant to his individualized education program (IEP).[1]

Extended School Year (ESY) services have never been included in Chance's IEP (Tr. 161). Chance has had a behavior plan since 1985 which is used successfully at home, as well as in the schools (Tr. 32, 119-120, 148-149).

---

[1] As used in the Education of the Handicapped Act:

> The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and whenever appropriate, such child, which statement shall include—
>
> (A) a statement of the present levels of educational performance of such child,
>
> (B) a statement of annual goals, including short-term instructional objectives,
>
> (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,
>
> (D) the projected date for initiation and anticipated duration of such services, and
>
> (E) appropriate objective criteria and evaulation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. §1401(a)(19).

Chance's parents began enrolling him in summer programs in 1980 (Tr. 69), and since 1982 have enrolled him in a summer program operated by the Toledo Autistic Society (TAS) (Tr. 70). The only effect noted or anticipated from the absence of summer programming for Chance is a temporary increase in inappropriate behaviors (Tr. 70, 146).

Despite some inconsistency in behaviors and levels of performance throughout the school year (Tr. 53, 152, 461), Chance has experienced slow, steady progress (Tr. 152, 460-461).

After Chance attended two summers in the TAS program, the Cordreys asked Evergreen to pay for that program as part of Chance's IEP. In November, 1985, an IEP meeting was held, but the parties were unable to reach an agreement regarding summer services (Stipulation 8). Instead, in May, 1986, the parties negotiated an "Agreement and Mutual Release" (JA. 42-46). The Agreement, *inter alia*, provided that the parties would select a psychologist to evaluate Chance to determine whether he needed ESY services in 1987 and, if such need were shown to exist, what program or programs would be appropriate (JA. 45, ¶5). Two programs were to be considered, a public program offered by the Fulton County Board of Mental Retardation and Development Disabilities and the private program operated by TAS.

The parties eventually agreed that Mark Pittner would conduct the evaluation (Tr. 181, 208, 327, 772). Dr. Pittner completed his evaluation in April, 1987. Dr. Pittner reported that the program offered by the Fulton County Board of Mental Retardation and Development Disabilities would be comparable to the TAS program desired by the Cordreys (JA. 52-53).

Dr. Pittner clearly misunderstood the parameters of his evaluation. He testified that it seemed to him that the parties "were making the preconceived idea that what they really wanted . . . to address was which one [ESY program] was more appropriate, not if he should have it" (Tr. 283).

Dr. Pittner concluded "that it was impossible to empirically or psychometrically assess whether or not a *need* for an extended school year was necessary for Chance" (JA. 48). He stated that Chance could benefit from an ESY program, and that "the risks of not being granted this opportunity appear unacceptable" (JA. 53), despite the fact that Chance continued to make steady, gradual improvement (Tr. 223, 226).

Dr. Pittner did not consult with Jerry Zake, whom he knew to be Chance's current school psychologist and the person who had conducted Chance's most recent multifactored evaluation (Tr. 284). Dr. Pittner did interview Chance's teacher, Judy Jacso (Tr. 234). Ms. Jacso charted the progress of Chance and each of the other students in her unit throughout the year, and kept detailed records of their progress or lack thereof (Tr. 460, 478-479). Thus, data existed that would have permitted comparison of Chance's progress or regression/recoupment with that of other students. However, Dr. Pittner did not request available data, nor make any attempt to compare Chance's experience with that of other children (Tr. 293). Dr. Pittner also acknowledged that not all profoundly retarded children (Tr. 276, 291), nor all autistic children[2] (Tr. 291), need ESY services.

[2] Mrs. Cordrey believes Chance is an autistic child (Tr. 71).

Each of the psychologists who tested and evaluated Chance over the years, Dr. Pittner (Tr. 290-291), Ned Pakosz (Tr. 683-684), and Jerry Zake (Tr. 704-705), regarded Chance to be making reasonable progress in view of his handicaps.[3]

On May 5, 1987, the parties met to discuss the results of Dr. Pittner's evaluation. The Cordreys understood this meeting to be an IEP meeting. Respondents understood it to be an informal meeting for the parents and Evergreen to discuss their understanding of Dr. Pittner's report (Tr. 778, 804). Neither Chance's teacher nor Dr. Pittner were present at the meeting. The District Court held that this was an IEP meeting, but that no IEP was developed at the meeting.

Notwithstanding the absence of any determination that ESY services were necessary for Chance to benefit from his education, Evergreen offered to make the County program available to Chance (Tr. 706, 779). Absent a demonstrated need for the services, Evergreen conditioned its offer upon an agreement by the Cordreys to exclude the program from the "stay-put" provision of the Education of the Handicapped Act, 20 U.S.C. §1415(e)(3).[4]

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[3] At the time of his impartial due process hearing, Chance functioned at the developmental level of a 17-21 month-old child (Tr. 704). Evidence at the hearing was that, given his developmental level a decade earlier, and assuming he had been provided appropriate educational programming with reasonable goals and objectives, Chance would have been expected to function at that level (Tr. 683-684).

[4] 20 U.S.C. §1415(e)(3) states:

> During the pendency of any proceedings conducted pursuant to this section, *unless the State or local educational agency and the parents or guardian otherwise agree,* the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed. (Emphasis addded.)

Following that discussion, the parents objected that the meeting was not a properly convened IEP meeting because Chance's teacher and Dr. Pittner were not present. Evergreen immediately offered to recess the meeting and reconvene with those individuals present (Tr. 804). The Cordreys and their counsel refused that offer, and left the meeting.[5] The entire meeting had lasted only a few minutes. Six days later, on May 11, 1987, the Cordreys requested an impartial due process hearing.

An impartial due process hearing was conducted. The Impartial Hearing Officer (IHO) concluded that if ESY services were not provided for Chance, there was an unacceptable risk to Chance's maintenance of academic progress, as well as behavioral and attending skills during the regular school year (Conclusion of Law ¶5). The IHO ordered that Chance receive ESY services through the County program unless the parties agreed that the County program could not meet Chance's needs.

The State Level Review Officer reversed, concluding that the parents had not sustained their burden of proving that Chance needed ESY services in order to benefit from his education.

The Cordreys appealed that decision to the United States District Court for the Northern District of Ohio, Western Division. The District Court held that Evergreen did not violate the procedural mandates of the EHA and that the Cordreys failed to prove that Chance would suffer significant regression of his progress toward self-sufficiency without a summer program.

The Cordreys appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit which affirmed.

[5] After the parties met on May 5, 1987, the Cordreys solicited a letter from Dr. Pittner in which he concluded that the TAS program desired by the Cordreys was preferable to the County program (JA. 54).

REASONS WHY THE PETITION SEEKING DISCRETIONARY REVIEW SHOULD BE DENIED

I. THE SIXTH CIRCUIT'S USE OF A REGRESSION/RECOUPMENT STANDARD FOR DETERMINING A HANDICAPPED STUDENT'S ENTITLEMENT TO EXTENDED SCHOOL YEAR SERVICES (A) IS SUPPORTED BY THE STATUTE, (B) COMPORTS WITH THE REASONING OF THIS COURT, AND (C) IS IN ACCORD WITH DECISIONS AMONG THE CIRCUITS.

A. The Education Of The Handicapped Act

The Education of the Handicapped Act assures handicapped children the right to a "free appropriate public education", which is designed to meet the needs of each handicapped child by means of an individualized education program (IEP), 20 U.S.C. §§1401(a)(18), 1412(1).[6]

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[6] "In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

> (1) The state has in effect a policy that assures all handicapped children the right to a free appropriate public education."

20 U.S.C. §1412(1).

"The term 'free appropriate education' means special education and related services that—

> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
>
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

20 U.S.C. §1401(a)(18).

Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 189, 200-201 (1982), construed the Act's mandate to provide a free appropriate public education to require personalized instruction that offers the child a "basic floor of opportunity" consisting of "access to specialized instruction and related services that are individually designed to provide educational benefit to the handicapped child."[7] The Court specifically declined to establish any one substantive test for determining the adequacy of educational benefits conferred upon all children. *Id.* at 202. The Court thus recognized that determining whether a particular child has received a free appropriate public education requires a case-by-case analysis of the facts and circumstances.

B. Extended School Year Services

The courts in several circuits have now addressed the provision of ESY services. The early cases overturned policies which precluded all handicapped students from receiving ESY services. See, *e.g.*, *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983); *Crawford v. Pittman*, 708 F.2d 1028 (5th

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[7] 20 U.S.C. §1401(a)(16) and (17) define the pertinent terms as follows:

> (16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.
>
> (17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

Cir. 1983); *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979) *aff'd sub nom. Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980).

More recently, the appellate courts have been asked to review the standard for determining whether a particular handicapped child is entitled to ESY services as a part of the child's free appropriate public education. This issue has now been addressed by the Fifth, Sixth and Tenth Circuits.

Contrary to Petitioners' submission, there is not confusion among these courts regarding the appropriate standard. Each of the circuits has looked first at whether the child suffers regression of attained skills and, if so, whether the child can recoup those losses within a reasonable time.

The Sixth Circuit has twice addressed this issue. In *Rettig v. Kent City School District*, 720 F.2d 463, 466 (6th Cir. 1983), the court briefly stated that a summer program was "not necessary to permit [the child] to benefit from his instruction". It thus affirmed the District Court which had stated that "a child is entitled to an extended school year if it would not be merely 'beneficial' but ... a necessary component of an appropriate education for the child", and particularly that such service "would be appropriate if it would prevent significant regression of skills or knowledge retained by [the child] so as to seriously affect his progress toward self-sufficiency." *Rettig v. Kent City School District*, 539 F. Supp. 768, 778-779 (N.D. Ohio 1981), *aff'd in part, vacated on other grounds*, 720 F.2d 463.

Relying upon *Rowley,* 458 U.S. at 199, 200, the Sixth Circuit has stated that a school district is not required to maximize a handicapped child's potential, but instead must provide "some educational benefit" to the child. *Cordrey v. Euckert,* 917 F.2d 1460, 1473 (6th Cir. 1990).

In *Cordrey,* the Sixth Circuit relied upon its earlier decision in *Rettig* that a party desiring ESY services must show that these are "necessary to permit [the child] to benefit from his instruction". *Cordrey,* 917 F.2d at 1473 citing *Rettig,* 720 F.2d at 466. Elaborating upon this standard, the Sixth Circuit herein stated:

> The best rule is that which recognizes that the school district has no purely custodial duty to provide for handicapped children while similar provision is not made for others. We therefore begin with the proposition that providing an ESY is the exception and not the rule under the regulatory scheme. Given those policy considerations, therefore, it is incumbent upon those proposing an ESY for inclusion in the child's IEP to demonstrate, in a particularized manner relating to the individual child, that an ESY is necessary to avoid something more than adequately recoupable regression.
>
> . . . If the child benefits meaningfully within his potential from instruction under a proper IEP over a regular school year, then ESY services may not be required under the Act unless "the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an [ESY]." *Alamo Heights,* 790 F.2d at 1158.

Cordrey, 917 F.2d at 1473. *Cordrey,* thus also followed the Fifth Circuit's earlier ruling regarding provision of ESY services to handicapped children. *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153, 1158 (5th Cir. 1986).

The *Alamo Heights* standard has also recently been adopted by the Tenth Circuit in *Johnson v. Independent School District No. 4 of Bixby*, 921 F.2d 1022 (10th Cir. 1990). However, *Johnson* also indicated that the regression/recoupment analysis is not the only viable measure to determine the necessity for ESY services. It noted a list of possible factors for consideration, but stated that it was not intended that each element would impact planning for each child's IEP. *Johnson, supra*, at n.9. The list of possible factors included, *inter alia*, the degree of regression, recoupment time, the degree of impairment, the child's rate of progress, and the child's behavioral and physical problems.

Some of these factors are also included in the five-point test proposed by Petitioners in reliance upon an unpublished decision in *Lee v. Thompson*, 1982-83 Educ. Handicapped L. Rep. (CRR Publishing), 554: 429 (D. Haw. 1983). In addition to regression and recoupment, *Lee* considered the nature and severity of the child's handicap, and the areas of learning crucial to progress towards self-sufficiency when determining whether a child was entitled to ESY services.

The Sixth Circuit has also recognized these factors as potential considerations in determining whether ESY is necessary for a particular child. The court stated that where empirical data regarding a child's regression and recoupment is unavailable, a child's need for ESY services may be proven by expert opinion based upon a professional assessment of the individual child which would take into account many of the factors mentioned in *Lee* and *Johnson*. *Cordrey*, 917 F.2d at 1472. Thus, *Cordrey* noted that its analysis does not differ significantly from either *Lee* or *Alamo Heights*. *Id.*

In fact, such evidence was clearly in the record of the proceedings in this matter. There was testimony regarding Chance's regression and his ability to recoup losses within a reasonable time (Tr. 416-419, 421, 430-431, 433-436, 471). There was testimony regarding the expectations for regression and recoupment for a child with Chance's impairments (Tr. 684-685, 694, 739). There was evidence that Chance functions at a level to be expected for one with his handicapping conditions (Tr. 683-684, 704). There was evidence that despite annual breaks in his programming, Chance has made and continues to make reasonable progress toward achievement of his educational goals (Tr. 290-291, 683-684, 704-705).

In summary, the courts below were presented with a set of facts and circumstances. Analysis of the record herein resulted in evidentiary findings, specifically, that Chance has received a free appropriate public education which has conferred some meaningful educational benefit, and that ESY services are not necessary for Chance to meaningfully benefit from his individual educational program. This analysis and result comports with the requirements of the Act, as interpreted by this Court. Moreover, there is not confusion among the circuits regarding the appropriate standard to determine when ESY services are necessary for a child to benefit from his education. Thus, this case does not warrant this Court's exercise of its powers of supervision with respect to this issue.

II. THE SIXTH CIRCUIT'S APPLICATION OF TRADITIONAL DEFENSES AND ITS ALLOCATION OF THE BURDEN OF PROOF AMONG PARTIES IN EDUCATION OF THE HANDICAPPED ACT CASES COMPORT WITH THE DECISIONS OF OTHER CIRCUITS AND PROVIDE NO BASIS FOR SUPERVISION BY THIS COURT.

Petitioners have focused upon two procedural issues. First, the court allocated the burden of proof to the parents as the party proposing a change in the services provided under Chance's IEP. *Cordrey,* 917 F.2d at 1469. The Sixth Circuit's decision on this issue accords with the decisions of other circuits.

Second, Petitioners disagree with the Sixth Circuit's rulings regarding alleged procedural errors. In the proceedings below, Petitioners alleged that several procedural errors had occurred. The courts concluded that the alleged procedural errors had not occurred, or that any error was harmless, correctable, or did not prejudice Petitioners. Despite the absence of any statutory language limiting the ordinary discretion of courts to weigh procedural matters, Petitioners claim that the court's action was contrary to the Act. Petitioners also claim that the Sixth Circuit's findings regarding the alleged procedural errors conflict with the findings of other federal courts. However, Respondents submit that these decisions can be harmonized.

A. The Sixth Circuit Properly Allocated The Burden Of Proof To The Parents As The Party Proposing To Change The IEP.

In *Cordrey,* the court relied upon its earlier decision in *Doe v. Defendant I,* 898 F.2d 1186 (6th Cir. 1990), and held that Petitioners, as the party challenging the terms

of Chance's IEP, should bear the burden of proving that the educational placement established by the IEP was not appropriate. 917 F.2d at 1469.

In reaching that conclusion, the Sixth Circuit cited *Tatro v. State of Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part and rev'd in part sub nom., Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984) ("because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate"). *Accord, Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986).

Other courts have also allocated the burden of proof in this manner. Citing *Alamo Heights, supra*, and *Tatro, supra*, the Tenth Circuit in *Johnson, supra*, allocated the burden of proof to the parents who proposed to change their daughter's IEP by adding ESY services to her educational program.

Even cases cited by Petitioners follow this reasoning. For example, in *Burger v. Murray*, 612 F. Supp. 545 (N.D.Ga. 1984), the court placed the burden on the school district, the party who sought to change the child's existing placement.

Similarly, in *S-1 v. Turlington*, 635 F.2d 342, 348-49 (5th Cir. 1984), the court addressed the burden of proof when a school district proposed to expel handicapped students for disciplinary reasons. Disciplinary expulsion is clearly a significant change in educational placement. *Honig v. Doe*, 484 U.S. 305, 325 (1988). Thus, *S-1*, 635 F.2d at 348-349, placed the burden on the school district to raise the issue whether disruptive behavior was a manifestation of the students' handicaps.

Petitioners have asked the Court to undertake review of this case because the highest court of one state has held that school districts should always bear the burden of proof in cases under the Act. Petitioners have alleged that the burden should always be placed upon the school district, claiming that the school is better able to meet that burden. Petitioners imply that imposing this burden on the school district would somehow further the quest for truth about a handicapped child's needs.

However, the Act and its implementing regulations establish procedural safeguards intended to assure parental participation in the education of handicapped children. Thus, parents are afforded the opportunity to participate in IEP meetings where decisions are made regarding the child's educational programming and placement. 34 C.F.R. §300.345(a).[8] Parents are permitted to obtain an "independent evaluation" of the child's needs at school district expense, if the parents disagree with the district's evaluation, and the district fails to prove that its evaluation was appropriate. 34 C.F.R. §300.503(b).[9] Parents must also be permitted "to examine

[8] 34 C.F.R. §300.345(a) states:

> Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:
>
> (1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and
>
> (2) Scheduling the meeting at a mutually agreed on time and place.

[9] 34 C.F.R. §300.503(b) states:

> A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under §300.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense.

all relevant records with respect to the identification, evaluation, and educational placement of the child". 20 U.S.C. §1415(b)(1)(A). Parents are similarly afforded the right to inspect and review education records of their children under the Family Educational and Privacy Rights Act. 20 U.S.C. §1232g(a)(1)(A).[10] Both parents and school districts thus have access to relevant information that may be used to determine whether a child has received a free appropriate public education.

As noted by the Sixth Circuit, "nothing in the Act indicates that alleged violations should be treated differently from alleged violations of any other federal statute imposing affirmative obligations on the states and their subsidiaries". *Cordrey,* 917 F.2d at 1466. Accordingly, *Cordrey,* like the decisions of other federal courts, simply follows the traditional allocation of the burden of proof. Petitioners have stated no argument that would compel a different conclusion.

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[10] 20 U.S.C. §1232g(a)(1)(A) states:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the educational records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

B. The Sixth Circuit's Conclusions Regarding Petitioners' Allegations Of Procedural Error Can Be Harmonized With The Decisions Of Other Circuits And Provide No Basis For Review By This Court.

In *Rowley,* this Court noted the importance that Congress attached to parental participation in the education of handicapped children as reflected in procedural safeguards that, *inter alia,* require notice and opportunity for parents to attend IEP meetings where educational placement decisions are made, and permit parents to examine all relevant records with respect to the identification, evaluation, and placement of the child. Thus, *Rowley,* 456 U.S. at 206, stated that Congressional emphasis on participation demonstrated "the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP".

Petitioners instead propose a standard of blind, absolute, and unswerving compliance that elevates procedural form over substantive content of the child's educational program. The Petitioners contend that, upon finding any procedural error, regardless of its nature or its harm, a court should abandon any substantive review of the appropriateness of an IEP. As recognized in *Cordrey,* 917 F.2d at 1466, "[i]n effect, they seek to employ Evergreen's technical violation to transform the administrative review process into an alternative route to obtain an ESY for Chance". Respondents submit that no language in the Act, nor in the prior decisions of this Court, warrants such a result.

Petitioners have identified five alleged procedural errors in this case. Two of these involve a May 5, 1987 meeting. The District Court concluded that this was an

IEP meeting which violated the procedural requirements of the Act because Chance's teacher did not attend, but that no placement decisions were made at the meeting. Instead, the parties discussed their disagreement as to whether Dr. Pittner's evaluation indicated that ESY services were necessary for Chance to benefit from his education. Evergreen suggested placing Chance in the County ESY program. Having interpreted Dr. Pittner's report to state that services would be merely beneficial rather than necessary for Chance, Evergreen conditioned the offer upon a waiver of the "stay-put" provisions of the Act. At that point, Petitioners objected that the meeting was not a proper IEP meeting because of the absence of Dr. Pittner and the teacher. Evergreen immediately offered to convene an IEP meeting with those people present. Petitioners, with benefit of counsel, rejected that offer.

Just as the courts were permitted to find, in the face of conflicting evidence, that the May 5 meeting was an IEP meeting, albeit lacking the presence of necessary individuals, the courts also had the discretion to consider what harm, if any, resulted. In this case, no placement decisions were made. Evergreen immediately offered to correct the alleged error. The courts determined that no harm was done.

Moreover, the courts determined that Petitioners, with knowledge, and benefit of counsel waived any error that might have occurred by unreasonably refusing to schedule another meeting. No provision of the Act, nor any decision of this Court, precludes knowing and voluntary waiver of a procedural error. There is no basis for finding that the courts' conclusions on this issue were clearly erroneous. Accordingly, the courts' conclusions do not warrant review by this Court.

Petitioners also claim that Evergreen committed procedural error by failing to document the Cordreys' refusal to schedule another IEP meeting. Petitioners acknowledged that they explicitly refused to conduct another meeting. Instead, they initiated a due process hearing six days later. Petitioners cannot explain how they were prejudiced by Evergreen's failure to document their refusal. Certainly the lack of documentation did not affect Chance's educational opportunities. As recognized by this Court in *Rowley,* the purpose of the procedural safeguards is to encourage opportunities for parental participation. Petitioners cannot explain how this purpose would be furthered by requiring a school district to document a fact which is not in dispute.

The third alleged procedural error involved Evergreen's conditional offer to place Chance in the County summer program, if the parents agreed to waive application of the "stay-put" provision. 20 U.S.C. §1415(e)(3). That provision is activated when a party alleges a violation of the Act, and initiates administrative and judicial review. It provides that a child will remain in his current educational placement during the pendency of administrative and judicial proceedings, unless the parents and the school district otherwise agree. The Sixth Circuit held that this was not a procedural issue, but instead a substantive issue. Chance's placement is governed by his IEP, and his IEP never included ESY services. The court concluded that there would have been error only if Chance was entitled to ESY services but had been wrongfully denied. *Cordrey,* 917 F.2d at 1468. The court, as discussed earlier, concluded that Chance was not entitled to ESY services. Thus, there was no error when Evergreen conditioned its offer of extra services, beyond its obligations under the Act, upon an exemption from the

"stay-put" provisions. As recognized by the Sixth Circuit, there is nothing in the Act to preclude such an offer. 917 F.2d at 1475.

In their fourth allegation of procedural error, Petitioners claim that Evergreen failed to properly develop an IEP in the face of the parents' refusal to meet. For the first time in their Petition to this Court, the Cordreys seem to be saying that in the face of their own refusal to attend an IEP meeting, the school district should have conducted an IEP meeting without the parents, and should have made a unilateral decision whether to provide Chance with ESY services. This would have put the school district in a "Catch-22". Had the district made a placement decision at a meeting without the parents, the parents would have argued that this was also error. By making their due process request, Petitioners had already put the issue into litigation. At that point, under the Act's "stay-put" provisions, Chance's placement was to remain the same unless the parties could agree on what, if any, ESY services were to be provided. Having already rejected Evergreen's interpretation of Dr. Pittner's report, and Evergreen's offer to provide ESY services through the County program which Dr. Pittner had specifically approved, there was no action remaining for Evergreen to take.

Petitioners also claim that Respondents failed to schedule another IEP meeting until forced to do so under the threat of impending litigation. The record clearly refutes this claim. Instead, the record demonstrates that the November, 1987 IEP meeting was planned a year in advance, long before Petitioners' due process request was even initiated.

As noted by the Sixth Circuit, Chance's IEP for the 1986-1987 school year (JA. 55) was prepared at an IEP meeting in November, 1986 and indicated that it was to be reviewed in November, 1987; furthermore, in their Reply Brief before that court, the Cordreys had acknowledged that throughout this litigation the parties continued to meet regarding Chance's educational program. 917 F.2d at 1468. The Act's implementing regulations require that a child's educational program should be reviewed at least annually. 34 C.F.R. §300.343(a),(d).[11] Petitioners never disputed that all persons required to be present at the IEP meeting were present at the meeting in November, 1987. It must be recognized that the due process hearings began shortly after that meeting. Had there been any dispute as to whether a proper IEP review meeting was convened in November, 1987, that issue could certainly have been raised at that time. It was not. Three years later, during oral argument before the appellate court, is rather late in the proceedings to suddenly object that the record of the due process hearing contains no documentation that the meeting actually occurred. In summary, the court properly found that Chance's IEP had been reviewed as required by the pertinent regulation, and there was no error in this regard. *Cordrey,* 917 F.2d at 1467-1468.

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[11] 34 C.F.R. §300.343 states:

> (a) Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.
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> . . . .
>
> (d) Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

For their final allegation of procedural violation, Petitioners' claim that Evergreen made decisions in 1984, 1985, and 1986 regarding ESY services for Chance outside of an IEP meeting. In 1986 the parties entered into an Agreement and Mutual Release in which Petitioners agreed to release and discharge Evergreen from any claim whatsoever, including "claims under federal or state laws or regulations relating to the education of the handicapped, from the beginning of time to the date hereof . . . arising from or out of the provision of or withholding of extended school year programming to Chance." (JA. 42-46). The Agreement specifically addressed obligations undertaken by Evergreen for partial reimbursement of Petitioners' costs for providing ESY services in 1984-1986, and established a procedure to determine whether ESY services would be necessary for Chance in 1987. *Id.* Thus, any claims that Evergreen erred in its method for deciding whether to provide ESY services to Chance in 1984-1986 were explicitly released and discharged, and not a proper issue for consideration during these proceedings.[12]

The Cordreys' Petition for this Court's review also references decisions made by the Sixth Circuit on procedural issues in other cases.[13] Petitioners claim that

[12] Moreover, the record demonstrates that the parties discussed the provision of ESY services during an IEP meeting on November 14, 1985. The parties disagreed as to the need for ESY services, and as to whether the County or TAS program, if either, was appropriate for Chance. To avoid litigation at a time when Evergreen was so financially strapped that it was faced with requesting access to state emergency loan monies, Evergreen entered into the Agreement and Mutual Release dated May, 1986 (Tr. 769).

[13] Petitioners cite *Thomas v. Cincinnati Board of Education*, 918 F.2d 618 (6th Cir. 1990) and *Doe v. Defendant I*, 898 F.2d 1186 (6th Cir. 1990). These cases do not involve the same facts, nor the same alleged procedural violations as are at issue in the present case. In

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the effect of these decisions together with *Cordrey* "is that parents do not have access to critical pieces and sources of information which the school district is required by law to collect, consider and make available". (Petition, p. 25). Petitioners do not explain how the alleged procedural violations at issue in this matter have impeded Petitioners' access to any information which Evergreen was required to collect, consider or make available. Petitioners do not and cannot claim that any request for Evergreen to provide information was denied. To the contrary, on the one occasion when Petitioners informed Evergreen that Chance's teacher and Dr. Pittner, two potential sources of information, were not present at a conference which Petitioners considered to be an IEP meeting, the record clearly demonstrates that Evergreen promptly offered to reconvene the meeting with those information sources present and available. However, Petitioners explicitly and unreasonably rejected that offer.

Petitioners also claim that the Sixth Circuit's ruling on procedural issues in this matter conflicts with decisions on procedural issues made by the Fourth Circuit. Petitioners specifically cite *Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988), and *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985). *Spielberg* involved a school district that unilaterally decided to change a child's placement before conducting an evaluation, and before developing a new

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each case the court was required to review evidentiary rulings in the context of a particular set of facts and circumstances. Allegations of procedural violations call for case-by-case analysis. Petitioners seem to be seeking review of evidentiary decisions in cases to which they were not parties and for which appeal time has run.

IEP to support the change. *Hall* involved a school district which failed to inform parents of their procedural rights, failed to provide special education services after identifying the child as handicapped, and later failed to revise an IEP which was not benefitting the child. 774 F.2d 631. The Fourth Circuit noted that the district's repeated failures to notify parents of their rights under the Act would of themselves constitute adequate grounds for holding that the school had failed to provide the child with a free appropriate public education, but also affirmed the district court's substantive finding that the district had failed to provide the child with an education reasonably calculated to enable him to receive educational benefits.

Clearly, the nature of the procedural errors alleged, and the facts and circumstances at issue in *Spielberg* and *Hall* are distinguishable from *Cordrey*. In addition, the Sixth Circuit determined upon review of the substantive issue that Chance has received the free appropriate public education to which he is entitled.

Moreover, the Fourth Circuit has itself recognized that minor or harmless procedural errors are not a sufficient basis for ignoring substantive issues, and automatically concluding that a child has been denied a free appropriate public education. In *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990), the parents removed a handicapped child from a residential placement, but waited several months, until shortly before the beginning of the school year, to notify the district that they intended to enroll the child in its schools. The district did not notify the parents or develop an IEP within the time periods provided by law. However, the district offered the family an interim placement pending development of the IEP. The family

refused the offer. 895 F.2d at 976. The Fourth Circuit expressly recognized *Rowley's* emphasis on ensuring compliance with the Act's procedures. Nevertheless, the court held that the procedural faults committed by the district in that case had not caused the child to lose any educational opportunity. 895 F.2d at 982. The harmless error was not cause to grant relief to the family.

In summary, contrary to Petitioners' claims, there is no conflict between the circuits on this issue. The courts examine each case on its own facts to determine whether alleged procedural errors occurred, and, if so, whether the child has been harmed. Neither the language or spirit of the Act, nor the prior decisions of this Court preclude such analysis.

In this case, the courts' review of the substantive issue resulted in a ruling that Chance did not require ESY services in order to meaningfully benefit from his special education in 1987. The standard used by the Sixth Circuit to evaluate this issue accords with the standard applied by the other circuits which have had the opportunity to consider provision of ESY services under the Act. The standard takes into account the Act's mandate to provide an appropriate education and this Court's decision that the education provided must confer some meaningful benefit. The standard can continue to be applied at each annual review of Chance's IEP.

The substantive ruling should not be ignored because of alleged procedural violations which have not impaired the parents' right to participate in development of Chance's educational program. The only alleged procedural violation properly before the courts which had the potential to deny full parental participation was easily and immediately correctable. The offer to correct was promptly made and unreasonably refused by Petitioners.

Nothing in the Act, nor in this Court's decisions indicates that any technical procedural missteps by a school district should automatically "transform the administrative review process into an alternative route to obtain an ESY" to which a child is not otherwise entitled. 917 F.2d at 1466.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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